United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,035

UNITED STATES OF AMERICA

v.

LARRY BROWN,

Appellant,

Appeal from the United States District Court
for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. The question is whether the Trial Court erred in refusing to dismiss the indictment when the only evidence against the appellant was a solitary fingerprint taken from the cash register in the complainant's drug store when the register was obviously able to be touched by a person standing on the patrons' side of the counter.

JURISDICTIONAL STATEMENT

On June 3, 1963, appellant was indicted on two counts, second degree burglary and grand larceny. A plea of not guilty was entered on July 26, 1968. Trial by jury was held on March 3 and 4, 1969, resulting in a verdict of guilty on both counts. On April 25, 1969, appellant was sentenced to concurrent terms of three to ten years imprisonment. Notice of appeal to this Court was filed on May 1, 1969.

This Court has jurisdiction of the appeal by virtue of Title 28, Section 1291, United States Code.

This case has not previously been before this Court under another name or title.

REFERENCE TO RULINGS

There are no references to rulings involved in this appeal.

STATEMENT OF THE CASE

On February 2 or 3, 1968, the Ayres Pharmacy, 1932 Nichols Avenue, S. E., was broken into sometime after closing hours and a sum of money and a quantity of merchandise valued in excess of $100 was stolen.

The appellant learned that the police were looking for him and on April 20, 1968 he surrendered himself to Officer Otis Fickling, Metropolitan Police Department, at which time he was arrested and charged.

The only evidence produced by the government to support its contention that appellant was involved in the burglary was a latent fingerprint taken from one of the cash registers in the store on February 3, 1968 (Tr. 23). A fingerprint expert testified that the print was identical to the left middle fingerprint of the appellant (Tr. 62).

The owner of the pharmacy, Irwin Ruben, testified that following the burglary he had seen the appellant in his store several times (Tr. 9). He further testified that he had not noticed appellant in his store prior to February 2, 1968 and that as far as he could remember he did not know appellant from Adam prior to February 2, 1968 (Tr. 9).

The fingerprint and Mr. Ruben's statement about seeing appellant in the pharmacy after February 2, 1968 was the sum total of testimony connecting appellant with the pharmacy in any manner at any time.

On cross-examination, Mr. Ruben admitted that the cash register upon which the print was found could be touched from the public side of the counter or desk on which it sat; that any part of the register could be touched from the public side of the counter; and that he had, in fact, seen it done (Tr. 12). The jury returned a verdict of guilty on both counts and this appeal followed.

STATEMENT OF POINTS

The Trial Court erred in refusing to grant the appellant's Instruction No. 1.

SUMMARY OF ARGUMENT

The appellant bases his entire appeal on the fact that the only evidence linking him with any crime was that of a solitary fingerprint taken from the cash register of the complainant's drug store. The register, as the evidence disclosed, could have been touched by a person standing on the patrons' side of the counter. The appellant was not placed at the scene of the crime by any eyewitnesses, nor was he found to have been in the immediate neighborhood at the time of the crime. In addition, the appellant was not shown to have been in possession of any of the stolen property allegedly taken from the drug store, nor was the age or freshness of the fingerprint established. In view of all of this evidence, or lack thereof, a verdict of not guilty should have been entered for the appellant.

ARGUMENT

I. The Trial Court Erred In Failing To Enter A Judgment Of Acquittal When The Only Evidence Connecting The Appellant To The Crime Was A Latent Fingerprint.

This case represents an excellent example of the failure of the government to carry its burden of proving that the appellant was guilty of the crimes as charged beyond a reasonable doubt.

On or about February 2 or 3, 1968, a drug store was broken into sometime after closing hours at 1932 Nichols Avenue, S. E., in the District of Columbia. Money and goods valued in excess of $100 were taken from the drug store.

Approximately 11 weeks later the appellant, after having learned that the police were looking for him, surrendered himself to an officer of the Metropolitan Police Department. He was then arrested and subsequently indicted on two counts, 2nd degree burglary and grand larceny.

At the time of trial the only evidence produced by the prosecution to support its claim that the appellant was indeed the guilty party was a fingerprint, age unknown, taken from one of the cash registers in the store on February 3, 1968. This testimony was the only evidence connecting the appellant with the drug store in question. There was no evidence to show that the appellant was at the scene of the crime or that he possessed any of the property stolen; there were no eyewitnesses to the crime; and, in fact, it was never shown that he was even in the neighborhood of the crime.

In a case very similar to the instant case this Court of Appeals has had an opportunity to rule under these circumstances. In *Hiet v. United States*, 124 U.S. App. D. C. 313, 365 F.2d 504 (1966), the only evidence was a fingerprint taken from a car window which was identified as the appellant's (Hiet's). Hiet was not placed in the vicinity of the automobile on the evening

in question or in the immediate neighborhood at any other time; nor was he shown to have been in possession of any of the stolen property at any time; nor was there any testimony as to the probable age of the fingerprint. The *Hiet* case is so clearly on point and so controlling in this appeal as to cause the appellant to wonder why his case was ever permitted to go to the jury. In *Hiet*, the Court stated:

> "Unquestionably the print raises a suspicion. But a suspicion, even a strong one, is not enough. Guilt must be established beyond a reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt. The crime of larceny is that the accused did 'take and carry away' something of value. Obviously one element of the crime is that the accused took the property; not that he was at some time in the vicinity of the property but that he took it and carried it away.
>
> "Where only circumstantial evidence is involved, it used to be stated that to sustain conviction the proof must negative every hypothesis save that of guilt. But in the *Holland* case in 1954, the Supreme Court said the better rule is simply to instruct properly on reasonable doubt, and expressed the view that the additional instruction is confusing and incorrect. In the case at bar there was on the evidence in the record a reasonable doubt that Hiet took the property; indeed there was no evidence whatsoever that he took it or carried it away. Without any evidence whatever connecting Hiet with the missing property, I think there is neçessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter. So the judgment must be reversed."

It certainly appears that on the authority set forth in *Hiet, supra,* the jury should have been instructed under the facts and circumstances of this case. In light of all the evidence their verdict must be for the appellant.

The issue presented in this appeal has also been determined in *Campbell v. United States*, 115 U.S. App. D. C. 30, 316 F.2d 681 (1963); *Cephus v. United States*, 117 U.S. App. D. C. 15, 324 F.2d 893 (1963); *Curley v. United States*, 81 U.S. App. D. C. 389, 392-393, 160 F.2d 229, 232-233, cert. denied, 331 U.S. 837, 67 S. Ct. 1511, 91 L.Ed. 1850 (1947). See also: *Cooper v. United States*, 94 U.S. App. D. C. 343, 218 F.2d 39 (1954); *Borum v. United States*, 127 U.S. App. D. C. 48, 380 F.2d 595 (1967), and *Stevenson v. United States*, 127 U.S. App. D. C. 43, 380 F.2d at 590 (1967).

CONCLUSION

The appellant respectfully submits that the overwhelming opinion of this Court on facts such as those presented in this appeal leads but to the conclusion that reasonable men might fairly conclude there was a substantial reasonable doubt and, therefore, the indictment on both counts should have been dismissed and judgment of acquittal entered. To permit a conviction to remain on the flimsiest of evidence such as appears here would be contrary to our whole basic philosophy in criminal law, *i.e.*, a person accused of a crime is presumed innocent until proven guilty beyond a reasonable doubt. There was more than reasonable doubt here and, therefore, the guilty verdict should be reversed.

Respectfully submitted,

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